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In the Supreme Court of the United States

October Term, 1972

No. .....

JOHN MICELI,
Petitioner,

and

THE CLEVELAND TRUST COMPANY,

vs.

UNITED STATES OF AMERICA, and
PETER B. PARISH, Agent,
Internal Revenue Service,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions below are not reported. The opinion of the court of appeals is printed as Appendix A, *infra,* pp. 13-16. The opinion of the district court is printed as Appendix B, *infra,* pp. 19-29.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the issuance of an internal revenue administrative summons at the behest, and under the aegis, of a Justice Department Organized Crime Strike Force, for the purpose of gathering evidence against one whom the Strike Force has designated an "organized crime figure" for specialized prosecutorial concern, constitutes an abuse of civil process.

STATUTE INVOLVED

United States Code, Title 26:

§7602. *Examination of Books and Witnesses.*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT OF THE CASE

In early 1970, the Cleveland Organized Crime Strike Force was established (R. 347) under the aegis of the Department of Justice (R. 239-240). The ultimate objective of the Strike Force was "to cripple and, hopefully, to eliminate organized crime in the United States" (R. 283). The modus operandi of the Strike Force consisted of the "compiling of names of individuals and businesses alleged to be involved or involved in organized crime" (R. 286), and focusing law enforcement's "specialized concern" on such "organized crime figures" (R. 292).

Among the names compiled for the Cleveland Strike Force program were Miceli Dairy Products Company, Inc., and John Miceli (R. 288).[1] Pursuant to this program a

1. Throughout the trial of this case Government agents consistently refused to disclose the basis for Miceli's inclusion in the list (R. 241, 242, 311-312).

meeting of the Strike Force's Internal Revenue Service representatives James Ruckriegle and Ray Wilwant (along with two other I.R.S. officials) determined to conduct an audit of Miceli Dairy Products and John Miceli (R. 298-300).

The audit investigation was assigned to Revenue Agent Peter Parish (R. 338), who was given Miceli's personal returns for 1967 and 1968 (R. 234) and instructed to contact Ruckriegle for further information (R. 205).[2] Throughout Parish's investigation of Miceli, copies of his progress reports[3] were forwarded to Ruckriegle in his Strike Force Office (R. 308) where they were accessible to Department of Justice attorneys (R. 309-310).

On August 25, 1970, Parish issued a summons pursuant to 26 U.S.C. §7602 to the Cleveland Trust Company (R. 261) seeking production of:

> "Any and all information regarding a $25,000 loan to the above company or John Miceli, its president, during 1970. Specifically:
>
> (1) Loan and application.
>
> (2) Financial statement submitted.
>
> (3) Note.
>
> (4) Correspondence." (R. 268).

After Cleveland Trust refused to supply him with the requested information, Parish served a second, more gen-

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2. Ruckriegle had previously spoken to training sessions of revenue agents "dealing with this specialized concern" to give them a "compilation of non-tax violations of the United States Code" so that they might refer such other violations to the Strike Force (R. 178-179, 292-294).

3. Parish refused to answer questions concerning the contents of the progress reports made concerning Miceli (R. 251), or to disclose his diary or notes made during his investigation of Miceli (R. 246-247).

eral summons on the Bank on September 21, 1970 (R. 394-395) seeking:

> "All books and records pertaining to any loan transaction, whether mortgage or other loans, had with, for or in behalf of Miceli Dairy Products Company, Inc. for the period April 1, 1967 through March 1, 1970. These records should include ledger cards, financial statements, correspondence and any and all other information pertaining to any loan transactions for the period mentioned above." (R. 395).

Upon the Bank's refusal to supply all of the information requested (ultimately all but Miceli's personal financial statement was furnished), the Government filed a petition to enforce the summons on December 16, 1970 (R. 6). John Miceli intervened as a party-defendant asserting that enforcement of the summons would constitute an abuse of process as well as a violation of his Fifth Amendment rights (R. 21-23).

After holding an evidentiary hearing (R. 199-381), the District Court declined to enforce the summons, holding that it had not been issued "in good faith" within the meaning of *Donaldson v. United States*, 400 U.S. 517 (1971), in that its sole object was to gather data for the criminal prosecution of John Miceli (R. 397, App. B, pp. 26-27,*infra*). On the Government's appeal, the court of appeals reversed, holding that the district court's finding that the summons had not been issued in good faith was "clearly erroneous" (App. A, pp. 14-15).[4]

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4. The Court of Appeals also concluded that Miceli's Fifth Amendment objection to enforcement of the summons had been dissipated by this Court's intervening decision in *Couch v. United States*, ... U.S. ....., 34 L. Ed. 2d 548 (1/9/73), a conclusion which petitioner does not herein contest.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for certiorari in this case in order to clarify the implications of its cryptic holding in *Donaldson v. United States*, 400 U.S. 517, 536 (1971):[5]

> "We hold that under §7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."

That *Donaldson* is in need of clarification is evidenced by a reading of the many lower court opinions rendered in its wake.[6] Although the court of appeals purported to

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5. The clarification of a prior decision of this Court is an appropriate justification for the exercise of the Court's discretionary certiorari jurisdiction. *S.E.C. v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

6. Among the questions raised in the lower courts regarding the proper interpretation of *Donaldson* are whether a recommendation for prosecution subsequent to issuance of the summons disqualifies it from judicial enforcement (compare *United States v. Kyriaco*, 326 F. Supp. 1184 (C.D. Cal. 1971) on remand from this Court, 401 U.S. 922 (1971) with *United States* v. *Weingarden*, 473 F.2d 454 (6th Cir. 1973)); whether the recommendation for criminal prosecution contemplated by *Donaldson* is the recommendation of the Special Agent of the Intelligence Division to his I.R.S. superiors (*United States v. Billingsley*, 331 F. Supp. 1091 (N.D. Okla. 1971) or the referral for prosecution to the Justice Department by I.R.S. (*United States v. Billingsley*, 469 F.2d 1208 (10th Cir. 1972) and whether the standard for quashing a §7602 summons is the "recommendation for prosecution" standard or it is the "sole purpose for criminal prosecution" criterion. In opting for the latter, in *United States v. Weingarden, supra*, at 460 n. 11, the Sixth Circuit observed:

> "The manner in which other Circuits have analyzed the *Donaldson* decision is interesting. The guidance provided is at best inconclusive, however.
>
> "The Seventh Circuit appears to have accepted the position advanced by the Government, quoting the 'holding' of *Donaldson* as it appears at the end of the Court's opinion.

(Continued on following page)

decide the instant case on factual grounds, i.e., that the district court's findings of "sole purpose" and issuance not "in good faith" were clearly erroneous, in reality the decision represents a conclusion of law as to the meaning of "good faith", "sole purpose" and "recommendation for criminal prosecution" as those terms were used in *Donaldson*.[7] Accordingly, the holding below that the summons issued pursuant to §7602 is enforcible notwithstanding the circumstances of its issuance raises a serious and substantial question as to the meaning and application of *Donaldson*.

In *Donaldson*, this Court rejected the taxpayer's contention that an internal revenue summons may not be employed in an investigation which has the potentiality of resulting in a criminal prosecution, on the ground that prosecution will necessarily depend on the result of the investigation and that even "a full-scale tax fraud investi-

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Footnote continued—

United States v. National State Bank and Green, M.D., 454 F.2d 1249, 1252 (7th Cir. 1972).

"The Eighth Circuit, on the other hand, has taken two positions with respect to the *Donaldson* decision. In one case the position advanced by the Government herein was apparently accepted. United States v. Troupe, 438 F.2d 117 (8th Cir. 1971). In a later case the Court was in accord with our analysis, stating:

'There is no indication that the sole objective of the summons is to gather evidence for criminal prosecution. The case therefore comes squarely within the rule of *Donaldson*.' United States v. Diracles, 439 F.2d 795, 796 (8th Cir. 1971)."

7. That such rulings are more legal than factual was recognized by another panel of the Sixth Circuit in deciding *Weingarden, supra*, just a month before the instant case was decided:

"In our opinion, the finding by the District Court that the sole purpose of the issuance of the summons is for criminal prosecution, is not a finding of fact. It is either a mixed finding of fact and conclusion of law, or it is a finding of the ultimate fact in the making of which is involved legal principles. It is subject to appellate review, and the clearly erroneous rule has no application." *Id.*, at 460.

gation . . . does not necessarily mean that prosecution ensues when tax liability becomes apparent." *Id.* at 535. At the same time the Court recognized the continuing vitality of the abuse of process limitation on the use of the internal revenue summons for criminal purposes by requiring that it be issued "in good faith and prior to a recommendation for criminal prosecution." *Id.*, at 536.

Although these terms were not defined in *Donaldson*, they can only be understood in terms of the underlying rationale for the abuse of process concept, i.e., that the process of the Court should not be used to accomplish a purpose for which it was not intended, *United States v. Powell*, 379 U.S. 48 (1964); 1 AM. JUR. 2d 250, *Abuse of Process*, Sec. 1, and that accordingly an administrative remedy granted to the Internal Revenue Service to aid in determining tax liability should not be used to assist the Department of Justice in gathering evidence for a criminal prosecution after a decision to prosecute has been made.

In the common investigation and audit of a taxpayer such as *Donaldson*, the effective decision to prosecute is not made until the Internal Revenue Service refers the case for prosecution to the Department of Justice. See *United States v. Billingsley*, 469 F.2d 1208 (10th Cir. 1972). However, the instant investigation and audit was not a common one as it was conducted at the behest, and under the aegis of the Justice Department's Organized Crime Strike Force. Pursuant to the Strike Force program, Miceli Dairy Products and John Miceli were first identified as "organized crime figures" (R. 286, 288) selected for the "specialized concern" of law enforcement (R. 292), prior to any Internal Revenue audit or investigation. The true significance of Miceli's designation by the Strike Force as an "organized crime figure" is revealed by then Attorney

General John Mitchell's explanation to Congress of the "strike force" concept and program:

> "The thrust of the Federal effort has been to strengthen the highly successful 'strike force' technique by the establishment of permanent organized crime field offices, under the coordination and control of the organized crime and racketeering section of the Criminal Division of the Department of Justice. There are now 12 functioning field offices, located in Buffalo, Detroit, Brooklyn, Philadelphia, Newark, Chicago, Miami, Boston, New York City, Cleveland, Los Angeles and St. Louis. The St. Louis office, which is our newest, opened on April 20, 1970 and will serve Missouri, Kansas, and southern Illinois. It provides a Federal presence within a geographic area in which at least two Cosa Nostra 'families' are known to be operating. By June 1, 1970, another field office will open in New Orleans where a prominent Cosa Nostra family is operating.
>
> "The field offices are staffed by Justice Department attorneys, supported by FBI agents and investigators from the Internal Revenue Service, the Bureau of Customs, the Securities and Exchange Commission, the Bureau of Narcotics and Dangerous Drugs, the Post Office Department, the Department of Labor, the Immigration and Naturalization Service, and the U.S. Secret Service. The prosecutors and investigators, by launching coordinated attacks on specific Cosa Nostra families in their assigned areas, pursue potential violations from infractions of the immigration, customs, and revenue laws, to loansharking, the sale of illegal drugs, and thefts of stocks and bonds. We think that their constant presence in organized crime-impacted

areas will represent a major improvement over the hit-and-run techniques which have been utilized in the past. The Department expects to have 20 fully staffed field offices operating by June 30, 1971.

"The strong infusion of investigative manpower has produced a significant rise in the number of high echelon Cosa Nostra figures indicted and convicted. Let me give you a few examples:

"During this year, the reputed bosses of two of the five New York Cosa Nostra 'families' were indicted on felony charges. Also, this March, the boss of the Boston Cosa Nostra family was convicted of murder by a Rhode Island jury in a State court.

"Early this spring, the alleged boss of the Chicago Cosa Nostra family was indicted in Chicago.

"This winter the reputed boss of the Philadelphia Cosa Nostra family was indicted in a Federal court.

"Last spring, in California, a reported 'underboss' of the Los Angeles family was convicted of a felony.

"Forty-four indictments were returned during 1969 against a total of 59 known or suspected Cosa Nostra members, as compared to 38 such indictments in 1968. Twenty-nine Cosa Nostra defendants were convicted as compared to 23 in 1968. The additional attorneys assigned to the organized crime and racketeering section, working in conjunction with the augmented investigative personnel of the various Federal agencies, have been responsible for this increased number of higher echelon criminals indicted and convicted."[8]

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8. Statement of Hon. John N. Mitchell, Attorney General of the United States, Hearings on S. 30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess. (May 21, 1970).

Thus it can be seen that the Cleveland Strike Force's designation of John Miceli as an "organized crime figure" represented an effective decision to prosecute him for whatever offense evidence could be garnered, a decision which was the functional equivalent of the "recommendation for criminal prosecution" alluded to by this Court in *Donaldson.* Accordingly, there was substantial basis for the district court to conclude that the §7602 summons was not issued "in good faith" within the meaning of *Donaldson.*

Accordingly, this Court should grant the petition for certiorari to consider this case which falls within the spirit, if not the letter, of the abuse of process limitation described in *Donaldson,* thus to better define the parameters of that limitation for the lower courts charged with administering it.

CONCLUSION

The issue raised is substantial and is of concern to the lower federal courts throughout the nation, and it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT J. ROTATORI and
NIKI Z. SCHWARTZ
GOLD, ROTATORI, MESSERMAN & HANNA
Attorneys for Petitioner

May 1972

APPENDIX A

Opinion and Judgment of the Court of Appeals

(Decided and Filed March 7, 1973)

No. 72-1804

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA AND PETER B. PARISH, Agent, Internal Revenue Service,
Petitioners-Appellants,

vs.

THE CLEVELAND TRUST COMPANY,
Respondent-Appellee,

and

JOHN MICELI,
Intervenor-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Before: WEICK, EDWARDS and KENT, Circuit Judges.

PER CURIAM. This is an appeal by the United States from an order of the United States District Court for the Northern District of Ohio denying judicial enforcement of a summons issued under the provisions of § 7602 of the Internal Revenue Code of 1954. 26 U.S.C. §§ 7602, 7402 (b), 7604(a) (1970). The judgment of the District Court

was entered some months before the United States Supreme Court decided *United States v. Couch,* ..... U.S. ..... (1973), 41 U.S.L.W. 4107 (U.S. Jan. 9, 1973). In that case the Supreme Court held that enforcement should be granted in relation to a government summons of financial reports and data turned over by taxpayer to her accountant for preparation of her income tax returns.

We believe the fact situation in *Couch,* on the basis of which the taxpayer therein argued that material in her accountant's hands was protected by her Fifth Amendment right of privacy, was somewhat stronger in support of that argument than is the fact situation in this case. In this case the data sought by the government consists of a financial report of the taxpayer submitted to the Cleveland Trust Company for the purpose of securing a commercial loan. We do not believe that one supplying such a report for such a purpose retains his constitutional right of privacy therein. It is our belief that the *Couch* case is authority for deciding this case in favor of the government, as far as the major legal argument presented to us on this appeal is concerned.

The District Judge, however, relied in his opinion upon *Donaldson v. United States*, where the Court said:

> We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution. *Donaldson v. United States,* 400 U.S. 517, 536 (1971).

The District Judge then held as a matter of fact that the taxpayer here was being investigated solely for criminal purposes and that the revenue summons had not been issued "in good faith."

On the total record of this case, we hold that these findings of the District Judge are clearly erroneous.

It is clear, of course, from the record in this case that the opening of a civil tax investigation into the tax returns of Miceli Dairy Products Co., Inc., in which John Miceli was a principal stockholder, was initiated by a representative of the Strike Force assigned in the Cleveland area to investigate organized crime on behalf of the Department of Justice of the United States. It appears to us that the District Judge's bad faith finding was directly related to his view that there was something odious about the Strike Force's recommendation of a civil audit. This court does not see why the transmission of information between two different units of the federal government pertaining to a possibility of tax liability should be the subject of judicial condemnation.

As we see this matter, the question is whether on this record there was in fact a good faith investigation of the civil liability of the Miceli Dairy and/or John Miceli individually, or whether the sole purpose of the investigation was the criminal prosecution of John Miceli. It is uncontested on this record that there had been at the time of the issuance of this summons neither an indictment concerning John Miceli nor a recommendation for prosecution. And we know of no reason why, if gross receipts of the corporation had been falsely understated, the fact that information was provided to the civil side of the Internal Revenue Audit Division by agents usually concerned with criminal prosecution should immunize the taxpayer corporation from investigation as to its civil liability for additional taxes. In *United States v. Couch, supra,* the Supreme Court said:

It is now undisputed that a special agent is authorized, pursuant to 26 U.S.C. § 7602, to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences. In *Donaldson v. United States*, 400 U.S. 517 (1971), the Court upheld such a summons, noting that:

> "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. . . . There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. . . . To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law." 400 U. S., at 535-536. *United States v. Coach, supra.* (Footnotes omitted.)

The judgment of the District Court is vacated and the case is remanded for the purpose of enforcement of the summons.

APPENDIX A (Cont'd)

Judgment Entry of the Court of Appeals

No. 72-1804

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA AND PETER B. PARISH, Agent, Internal Revenue Service,
Petitioners-Appellants,

vs.

THE CLEVELAND TRUST COMPANY,
Respondent-Appellee,

and

JOHN MICELI,
Intervenor-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and case is remanded for the purpose of enforcement of the summons.

It is further ordered that Petitioners-Appellants recover from Respondents-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

APPENDIX B

Memorandum and Order of the District Court

(Filed March 27, 1972)

Civil Action No. C70-1158

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA and PETER B. PARISH, Agent, Internal Revenue Service,
Petitioners,

vs.

THE CLEVELAND TRUST COMPANY,
Respondent,

and

JOHN MICELI,
Intervenor-Defendant.

MEMORANDUM AND ORDER

A summons was issued on September 21, 1970 which directed the Cleveland Trust Company to deliver to the Internal Revenue Service certain financial statements of their client, John Miceli. In February, 1970, John Miceli Dairy Products Company, a corporation primarily owned and controlled by John Miceli and operated by his family, sought and obtained a loan from the Cleveland Trust Company. Due to the substantial ownership of John Miceli in the corporation, a personal financial statement was re-

quested of Miceli by the Cleveland Trust Bank. A financial statement was submitted to the Cleveland Trust Co., and it is this personal financial statement which is the request of the internal revenue summons and the subject of this case.

Under the policy of the Cleveland Trust Company, the financial statement submitted to them by the client is the property of that client, and the bank holds this property as a constructive trustee for the desired period, and upon fulfillment of the bank's purpose, the financial statement, as well as all other required papers, etc. are returned to the client. The Cleveland Trust Company considers itself the holder of the personal property of the client, and only upon an order of the court will it deliver the property to the Internal Revenue Service.

The government states that the personal financial statement of John Miceli is necessary for the purpose of a corporate audit being conducted by the government to ascertain the correctness of corporate income tax returns.

The defense claims that in early 1970, a meeting was held between officials of Internal Revenue Service and an individual of the Government's organized crime strike force, for the purposes of conducting an investigation of John Miceli and Miceli Dairy Products Company. The defense further claim that the I.R.S. and the organized crime strike force had at this time the intent and purpose of beginning a criminal tax case against John Miceli. The defense contends that at this meeting it was the intent of the government to begin a tax investigation of John Miceli through the Field Audit Division of the I.R.S., the branch that conducts civil tax investigations. The defense maintains that the I.R.S., along with the organized crime strike force used what appeared to be civil proceedings, and in

this specific instance, civil process, for the purpose of investigating and gathering evidence for an intended criminal prosecution of John Miceli. The defense claims in effect that civil process was used in an attempt to disguise a criminal prosecution; and consequently the summons power was abused, and further, the defense claims that since the Internal Revenue Service is conducting a criminal investigation of John Miceli, the Fifth Amendment rights can be raised and should be applied. In substance, the defense maintains that this summons is an abuse of the Court's process, that the purpose and intent of the government is not civil but is criminal, and further that the Fifth Amendment rights of John Miceli must be protected.

Upon a careful consideration of the evidence in this case the Court makes the following findings of fact. The Cleveland Strike Force is composed of representatives of various federal, state and local enforcement and regulatory agencies, as well as attorneys from the United States Department of Justice. The Strike Force operation basically is a pooling from such various agencies of information regarding individuals believed to be involved or associated in some manner with organized crime. The ultimate objective of the Strike Force is to cripple or eliminate organized crime in the United States.

The Cleveland Strike Force initiates its "program", by compiling a list of names of individuals and businesses which they consider to be allegedly involved in organized crime. Based upon information contained in the Strike Force files, the case is assigned for investigation to either the I.R.S. Audit Division or the I.R.S. Intelligence Division. The I.R.S. Audit Division concerns itself with civil investigations, while the I.R.S. Intelligence Division concerns itself with criminal investigations. If the information in

the Strike Force files is of a specific nature indicating violations of income tax laws which possibly could constitute criminal violations, these cases are designated as Intelligence Division cases. If the information is of such a nature which could not pinpoint whether there are or are not violations, these cases are designated as Audit Division Cases.

The Cleveland Strike Force has been in existence for approximately two years. It is almost exclusively concerned with the investigation and prosecution of criminal matters, having litigated only one civil suit since its inception. It has never filed a civil action for the collection of taxes.

The Cleveland Strike Force audit "program" for the Audit Division of the Internal Revenue Service is a compiling of names of individuals and businesses alleged to be involved or which are involved in organized crime.

The Cleveland Strike Force "program" referred to in this case was drafted by James Ruckriegle, I.R.S. Audit representative to the Cleveland Strike Force, Ronald G. Kast, I.R.S. Audit Group Manager, Mr. Wilson, I.R.S. Intelligence Group Manager, and Mr. Wilwant, I.R.S. Intelligence Division Strike Force representative. Once drafted, the program is submitted to the District Director and the Regional Commissioner of the I.R.S. for approval and implementation.

In March 1970, a meeting was held to draft the Cleveland Strike Force "Program". Present at such meeting were agents Ruckriegle, Kast, Wilson and Wilwant. Prior to the meeting Ruckriegle had examined the personal income tax returns of John Miceli. At the meeting, Ruckriegel initiated a discussion regarding John Miceli and Miceli Dairy Products, Inc. Ruckriegel informed the others

at the meeting that it was believed that John Miceli was instrumental in causing the gross receipts of Miceli Dairy Products, Inc. to be understated, which if true would constitute criminal tax fraud. With the purpose of further investigating such allegation that John Miceli was instrumental in causing a fraudulent tax statement to be filed by the Miceli Dairy Products, Inc., the names of John Miceli and Miceli Dairy Products, Inc. were added to the Cleveland Strike Force Audit "program". Such "program" was thereafter approved and implemented.

In the later part of April or the first part of May, 1970, Ronald G. Kast assigned the instant case to I.R.S. Audit Division Agent, Peter B. Parish for investigation. Although Kast and Parish testified that the investigation was to be of the Miceli Dairy Products, Inc., for the tax years ending March 31, 1968, March 31, 1969 and March 31, 1970, Kast gave to Parish the personal tax returns of John Miceli and Mary Miceli for the tax years ending March 31, 1967 and March 31, 1968. At this meeting, Agent Parish did not receive the corporate returns. He received the March 31, 1968 corporate return in May, 1970, the March 31, 1969 corporate return in July or August 1970, and the March 31, 1970 corporate return in November, 1970. Kast also instructed agent Parish to confer with James Ruckriegle of the Strike Force before he began his investigation.

Agent Parish telephoned Ruckriegle for an appointment to discuss his new assignment. The switchboard operator answered the telephone by saying "Justice Department." A day or two later, Parish went to Agent Ruckriegle's office in the Standard Building in Cleveland, Ohio and saw the "Justice Department" sign on the door. Although Agents Parish and Ruckriegle refused to tell the

Court what was discussed at the meeting, it was learned that the discussion concerned misstatements in the corporate returns and John Miceli personally. What Ruckriegle told Parish amounted to allegations of criminal tax fraud. The meeting was not really a discussion since Ruckriegle did all of the talking and Parish just listened. Clearly Ruckriegle was in charge of the meeting.

Thereafter, Agent Parish began his investigation of John Miceli and Miceli Dairy Products, Inc. He made periodic progress reports of his investigation. Such reports concerned both John Miceli and Miceli Dairy Products, Inc. These reports were on a "disclosure list" meaning that they were accessible to Justice Department and Strike Force members. Unfortunately, the government refused to divulge to this Court the contents of those reports. Although Agent Parish kept a diary regarding his investigation of this case, Agent Parish refused to produce such diary or to testify in the case regarding the contents of the diary. It is clear however, that Agent Ruckriegle was kept fully advised of the progress of this investigation by both oral and written reports.

In furthering the investigation of John Miceli and Miceli Dairy Products, Inc., Agent Parish caused an I.R.S. summons to be served upon The Cleveland Trust Co. on August 25, 1970, which summons requested:

> "Any and all information regarding a $25,000 loan to the above company or John Miceli, its president, during 1970. Specifically:
>
> "(1) Loan and application.
>
> "(2) Financial statement submitted.
>
> "(3) Note.
>
> "(4) Correspondence."

Since the foregoing summons indicated that it was issued in the matter of the tax liability of Miceli Dairy Products Company, Inc., The Cleveland Trust Co. refused to give Agent Parish any personal financial statement of John Miceli unless the summons addressed itself to the tax matters of John Miceli personally.

Having failed in his effort to obtain a personal financial statement of John Miceli, Agent Parish withdrew the summons of August 25, 1970. Attempting to conceal the true objective of the summons, Agent Parish caused to be served upon The Cleveland Trust Co. the September 21, 1970 summons which is the subject of this action. Such summons was more general in nature and requested:

> "All books and records pertaining to any loan transaction, whether mortgage or other loans, had with, for or in behalf of Miceli Dairy Products Company, Inc. for the period April 1, 1967 through March 31, 1970. These records should include ledger cards, financial statements, correspondence and any and all other information pertaining to any loan transactions for the period mentioned above."

In response to the September 21, 1970 summons, The Cleveland Trust Company gave to the I.R.S. the information and all the items requested, except for the personal financial statements of John Miceli. In order to process the loan application of February, 1970 of Miceli Dairy Products Company, Inc., the bank requested and John Miceli supplied personal financial statements. As a general practice such financial statements are requested by the bank solely for financial credit analysis to aid the bank in its determination as to whether or not to grant the loan. Once the loan is made there is no real need or necessity for the bank to maintain the financial statements. The

bank cannot disclose the financial statements or the information contained therein without the customer's permission. Such statements are strictly confidential. The bank has a fiduciary obligation to the customer in regards to these statements and the information contained therein. The bank cannot destroy the statements without the customer's permission, since such statements belong to the customer and not the bank. The bank has an obligation to return these statements to the customer when requested to do so by him. The bank holds the physical financial statements as well as the information contained therein as a constructive trustee. At all times herein concerned, John Miceli had constructive possession of such financial statements. The government would have no more right to take the statements from the bank than from John Miceli personally.

A careful review of the evidence in this case leads this Court to the firm conclusion that the I.R.S. summons of September 21, 1970 was not issued in good faith, in the sense that the sole object of the summons,—in fact the entire investigation,—was to gather data for the criminal prosecution of John Miceli. Members of the Cleveland Strike Force assembled in March, 1970 to draft its "program". The real reason that John Miceli was added to the "program" or otherwise blacklisted is not known to this Court, since the government witnesses who were present at the meeting refused to testify as to what was discussed, except as heretofore set forth. It is not necessary for this Court to determine whether the members of the Cleveland Strike Force had probable cause to add John Miceli to its "program". However, this Court finds it noteworthy that the evidence before this Court indicates that John Miceli and his family had operated this company for many decades, and there is not one iota of evidence that they or he had

ever done anything dishonorable. It is noteworthy that the government witnesses refused to relate allegations, let alone facts, which would justify the blacklisting of John Miceli.

The United States Supreme Court in the case of *Donaldson v. United States*, 400 U.S. 517, clearly sets forth the standards by which a summons issued under 26 U.S.C. §7602 is to be judged, when the Court states at page 536:

> "We hold that under §7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."

From a reading of the foregoing case, it is apparent to this Court that the Supreme Court included the requirement of good faith in the issuance of such a summons to protect the constitutional rights of individuals who are being investigated solely for criminal purposes. By assigning this case to the Audit Division of the I.R.S. for investigation, the Cleveland Strike Force attempted to disguise its true purpose and to do indirectly that which it could not possibly do directly. The claim of the plaintiffs in support of their case that technical administrative steps were never taken in making a recommendation for criminal prosecution does not impress this Court, since the evidence clearly shows that the Cleveland Strike Force had embarked upon what has here every indication of a "witch" hunt.

The plaintiffs would have this Court believe that from the time Agent Kast first assigned the instant cases to Agent Parish for investigation, Agent Parish truthfully believed that he was conducting only a routine civil audit. This Court finds that the contrary is true.

We have mentioned the refusal of government witnesses to answer proper questions. The witnesses referred to are Peter B. Parish, James Ruckriegle and Ronald G. Kast. Although these witnesses testified freely when questioned by plaintiffs' counsel, they refused to answer questions propounded to them by counsel for the Intervenor-Defendant regarding:

1. The Cleveland Strike Force meeting in March, 1970 at which time John Miceli was added to the "program."
2. The meeting between Agent Parish and James Ruckriegle, at which time John Miceli was discussed.
3. The contents of the progress reports made concerning John Miceli.
4. The diary or notes made by Agent Parish during his investigation of John Miceli.

Whenever questions regarding these and other matters were put to such witnesses, they would refuse to answer and would rattle off the following jargon:

> "Your Honor, I respectfully decline to answer the question because the authority granted me by the Commissioner of Internal Revenue does not extend to this question."

As each of these government witnesses made this exact statement of avoidance, the government counsel said not one word to them. The Court instructed the witnesses to answer, but they refused. All of this time counsel for the government remained mute.

Counsel for John Miceli has urged this Court to make certain inferences from the withheld testimony of these

witnesses. This the Court will not do since sufficient evidence exists in this case which negates the necessity of making such inferences.

This Court is appalled at the behavior of certain members of the government in this case. The evidence was that secret Strike Force meetings were held to discuss which citizens were to be blacklisted as enemies of the country, and John Miceli's name was on the list. Government agents refused to divulge to this federal court the nature of the discussions held by them, or the reasons for their having blacklisted this man. A concerted effort was thereafter made to find some crime, any crime, with which to charge the individuals on such list. The civil branch of a government agency was then called upon to participate in the hunt and to disguise the activity. To gather evidence in such investigation, civil process was used, and thereby abused. In this Court's search for justice in this case, it finds that such members of the government had no interest in justice.

In accordance with the foregoing, it is,

ORDERED, ADJUDGED and DECREED that the Internal Revenue Summons of September 21, 1970 directed to the Cleveland Trust Co. regarding John Miceli and Miceli Dairy Products Company, Inc. is void and of no effect.

It is further ORDERED that judgment is hereby rendered on behalf of the respondent, The Cleveland Trust Co., and the intervenor-defendant, John Miceli, with costs assessed to the petitioners.

/s/ JAMES C. CONNELL, *Senior Judge*
United States District Court

Dated March 27th, 1972.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1606

JOHN MICELI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The United States instituted this action in the United States District Court for the Northern District of Ohio to enforce an Internal Revenue Service summons. The summons directed the Cleveland Trust Company to deliver, *inter alia,* a personal financial statement submitted by petitioner in connection with a loan application. Petitioner intervened, claiming that the summons had not been issued in good faith prior to a recommendation for criminal prosecution, as required by *Donaldson* v. *United States,* 400 U.S. 517.

The district court found that the sole object of the summons was to gather data for a criminal prosecution and therefore that its issuance was not made in good faith. The district court accordingly denied enforcement of the summons. The court of appeals reviewed the record and determined that the summons was in

fact issued in the course of a good faith investigation of petitioner's civil liability and that the findings to the contrary by the district court were clearly erroneous. The court of appeals vacated the judgment of the district court and remanded for enforcement of the summons.

Petitioner here claims that the court of appeals erred in its interpretation of the facts of this case and that review by this Court is necessary to clarify the meaning of the "good faith" requirement of *Donaldson*.

2. The court of appeals correctly interpreted the facts of this case in an opinion (Pet. App. 13-16), on which we rely, and there is no need for further review of the essentially factual question of "good faith." In any event, this Court, on May 21, 1973, denied petitioner's application for a stay of the mandate of the court of appeals, and the Cleveland Trust Company thereupon delivered petitioner's personal financial statement as directed by the summons; the petition therefore appears to be moot.

Moreover, contrary to petitioner's contention, the application of the "good faith" requirement poses little difficulty in any particular case: the issue, as the court of appeals below properly noted, is simply whether the summons was issued in the course of a genuine inquiry into civil tax liability. The fact that the taxpayer in question may also be suspected of criminal violations does not affect the validity of the summons, so long as there has been no recommendation for criminal prosecution. See *Donaldson* v. *United States*, *supra*, 400 U.S. at 531-536. It is undisputed that there had been no recommendation for prosecution of peti-

tioner at the time the summons in question here was issued (Pet. App. 15). Contrary to petitioner's suggestion (Pet. 6-7), the courts of appeals are in agreement that such a summons is valid. See, *e.g.*, *United States* v. *Billingsley*, 469 F. 2d 1208 (C.A. 10); *United States* v. *National State Bank*, 454 F. 2d 1249 (C.A. 7); *United States* v. *Bell*, 448 F. 2d 40 (C.A. 9).

Petitioner's argument here rests solely on the fact that federal agents responsible for criminal investigations called the attention of the Internal Revenue Service Audit Division to petitioner's tax returns and those of the corporation in which he had interest. But as the court of appeals below properly concluded (Pet. App. 15):

> * * * we know of no reason why, if gross receipts of the corporation had been falsely understated, the fact that information was provided to the civil side of the Internal Revenue Audit Division by agents usually concerned with criminal prosecution should immunize the taxpayer corporation from investigation as to its civil liability for additional taxes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07